

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED

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DISTRICT COURT
HARTFORD, CT.

MICHAEL KROPOSKI,

Plaintiff,

v.

FEDERAL AVIATION ADMINISTRATION,
and JOHN DOE'S 1-5

Defendant.)

Civil Action No. 3:08cv1519(AWT)

308CV01519 AWT

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to order the production of agency records, concerning the NY/NJ/PHIL Airspace Resign Project (the "Project"), in accordance with 40 CFR 1506.6 (f) which defendant has improperly withheld from plaintiff. Prompt release of the information was essential to meeting a deadline for comments on the proposed federal action; and continues to be important because of the immediate public interest in this information and for damages based upon deprivation of First Amendment rights to petition the government for a redress of grievances.

A. PARTIES

2. Plaintiff is a resident of Ridgefield, Connecticut and has participated in numerous civic organizations and political meetings such as the Town Of Ridgefield Board of Selectmen meetings which have discussed and express concern with the FAA's NY/NJ/PHIL Airspace Redesign Project,
3. Defendant Federal Aviation Administration ("FAA") is an agency of the United States as that term is defined in the Freedom of Information Act ("FOIA") and has its principal place of business at 800 Independence Avenue SW, Washington, D.C.20591. The FAA also maintains an Eastern Regional Office with its principal place of business at One Aviation Plaza, 159-30 Rockaway Boulevard, Jamaica, New York 11434. The

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Eastern Regional Office oversees all airports in the New York Metropolitan area and plays an important role in coordinating the Project.

4. Defendants John Does 1-5 are employees of the FAA which participated in or otherwise conspired to deprive Plaintiff of his constitutional rights. Their specific names will added after discovery of them.

B. JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court pursuant to 28 U.S.C. 1331 , 5 U.S.C. 552 (a)(4)(B) and 554 (a)(6) and 5 USC 706(2)(A) and (D) and Bivens v Six Unknown Agents, 403 U.S. 388(1971).

Venue is proper in this Court pursuant to 28 U.S.C. 1391(e) and 5 U.S.C. 552(a)(4)(B).

C. NATURE OF THE CASE

6. The defendant, FAA, published a draft environmental impact statement,(DEIS) in December 5,2005 inviting public review and comment on its proposed action to rearrange and redesign the aviation airspace in the NY metro area. The draft omitted extensive information on the methods and data used to formulate the DEIS. Pursuant to 40 CFR 1506.6 (f) Plaintiff made several requests for records and documents pertaining to the DEIS.
- 7 On April 25, 2007 Plaintiff made a request under FOIA for records (FAA docket 2007-4500) on the NIRS input data from the Project. After numerous phone calls asking for an expeditious response in order to comment on the DEIS, the FAA mailed these records on July 3 2007, 3 days after the DEIS comment period closed.
- 8 On June 29,2007 Plaintiff made a request under FOIA for records (FAA docket 2007-5953) on the impact of adverse weather on air operations. This request was responded to by letter dated August 9, 2007.
- 9 On August 23, 2007 Plaintiff made a request under FOIA for records (FAA docket 2227-7152) that deal with the calculation of the break-even point mentioned in FEIS which had been released for the Project on August 1, 2007. On October 9, 2007 the FAA responded unbelievably with a letter stating they had no records for this calculation .
- 10 On September 5, 2007 the FAA released their Record of Decision (ROD) on the Project Final Environmental Impact Statement (FEIS) which foreclosed any further possibility of Plaintiff commenting on the FEIS pursuant to 40 CFR 1503.1(b).
- 11 On September 20, 2007 Plaintiff spoke by phone with Mr. Pete Wilson an FAA manger of the Project to obtain information about the Project. Mr Wilson told Plaintiff that their "lawyers had issued a gag order" and he could give no further details because an appeal had been filed concerning the Project's FEIS. Plaintiff responded that he was not party to any legal action and such appeals were not grounds to withhold information under FOIA. Mr Wilson and his colleagues have nevertheless refused to give any further information to date.
- 12 On September 20, 2007 Plaintiff made a request under FOIA for records (FAA docket 2007-7793) for specified records relating to the Project. This request was responded to on September 23, 2008 with a half page chart and some news clippings, all other

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documents being withheld under the deliberative exemption.

- 13 October 12, 2007 Plaintiff made a request under FOIA for records (FAA docket 2008-0256) on the Landrum and Brown 2005 report cited in the FEIS. On December 28, 2007 Defendant responded with a claim of no records for this request. On January 21, 2008 Plaintiff appealed this determination on the basis of an amendment to FOIA on January 1, 2008 which provided that Defendant's contractors files must also be searched. No decision on this appeal has been received as of this date.
- 14 In October, 2007 The Town of Ridgefield Ct. joined a group of Connecticut towns which filed an appeal to the Courts of the Project FEIS's ROD.
- 15 In order to provide comments on the Project's FEIS to the Town's appellate counsel and to make a request for a supplement to the Project FEIS on October 23, 2007 Plaintiff made a request under FOIA for records (FAA docket 2008-0513) for specified records relating to a statement in the ROD for the Project. On August 5, 2008 the Defendant responded by requesting a concurrence of Plaintiff to a fee of \$90 for searching costs. Plaintiff concurred under protest that searching fees for the FEIS documentation are not allowed under 40 CFR 1506.6(f). Defendant produced a responsive document consisting of table with 16 numbers on September 11, 2008 and claimed \$90 searching fees.
- 16 On October 31, 2007 Plaintiff made a request under FOIA for records (FAA docket 2008-2008-0639) for records on the consultation of the FAA Noise Ombudsman for the Project. On June 11, 2008, the Defendant responded that the records requested were protected from release under FOIA Exemption 5. Plaintiff appealed this determination on the basis that the FAA Noise Ombudsman has a duty under 49 USC 106(q) to liaison with the public on aircraft noise issues which appears to be a direct conflict with the Defendants claim of a secret deliberative process. Plaintiff further appealed the Defendant's claim of searching fees.
- 17 On November 25, 2007 Plaintiff made a request under FOIA for records (FAA docket 2008-1070) used to create a chart on benefits of the Project FEIS in the Congressional Briefing of November 16, 2007. On April 2, 2008 Defendant responded that it had no records responsive to the request. Plaintiff appealed this determination on April 15, 2008 (8B). A decision on this appeal has not been received to date.
- 18 On June 28, 2008 Plaintiff made a request to the Defendant for a supplement to the Project FEIS on the basis of extraordinary increase in jet fuel prices, an unforeseen new event which dramatically changes the operating environment of aircraft contrary to a Key Assumption made in the Project FEIS. Defendant has not made proper response to this request to date notwithstanding that on July 31 Defendant made an order re-evaluating the impact of several other recent events.

D. CAUSES OF ACTION

Violation of the Freedom of Information Act by wrongful withholding of Agency records

19. Plaintiff repeats and realleges paragraphs 1-18. Defendant FAA has repeatedly wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of FOIA

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requests, requesting searching fees and improperly claiming that the records requested were in part exempt under FOIA.

21. Plaintiff is entitled to injunctive relief with respect to prompt release and disclosure of requested documents and their subsequent use in commenting on the Project.

Violation of the Administrative Procedure Act by acting in an Arbitrary and Capricious Manner

22. Plaintiff repeats and realleges paragraphs 1-18.
23. Defendants acted in an arbitrary and capricious manner in responding to Plaintiff's requests for records under FOIA for the Project FEIS in violation of the Administrative Procedures Act, 5 USC 706(2)(A) and (D). Defendants engaged in a course of conduct designed to suppress and limit comments and supplement to the Project DEIS and FEIS .

Violation of Plaintiff's civil rights guaranteed under the First Amendment of the US Constitution

- 24 . Defendant's intentional course of conduct which was intended to suppress and hinder Plaintiff's ability to make comments on the Project which opposed some aspects of Defendant's preferred course of action was so extreme and effective that it substantially interfered with Plaintiff's right to petition the government for redress of grievances pertaining to the Project.

E. REQUEST FOR RELIEF

- 25 WHEREFORE, Plaintiff requests this Court:

1. Order defendant to provide access to the requested documents and access to all documents pertaining to the above mentioned Project by making the Project records available for inspection and copying for 60 days; the defendant shall thereupon reopen the closed comment period on the Project FEIS and allow defendant and others to make comments and defendant shall reopen the administrative record and include the aforesaid comments in it, and shall further provide responses to all new comments;
2. Expedite this proceeding as provided for in 28 U.S.C. § 1657;
3. Award plaintiff costs and reasonable attorneys fees in this action, as provided in 5 U.S.C. § 552(a)(4)(E) and/or 28 USC 2412 and 5 USC 504 ; and
4. Grant such other and further relief as it may deem just and proper.

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Respectfully submitted,



Michael Kroposki
PO Box 603
Ridgefield, CT. 06877
mkroposki@sbcglobal.net

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained in the complaint is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621. Executed at Ridgefield, Connecticut on October 5, 2007.
(location) (date)


Plaintiff